the excepted classes, and to have been in possession of something which is accepted, in respect of those classes of persons, instead of an identity card. Therefore, if he was a member of one of the excepted classes, in the light of the judgment in *Abdul Manap's* case, it seems to me perfectly clear that the onus lay on him to prove that he was not within the application of the Regulations. I therefore hold that the learned Magistrate was wrong in the view that he took at the trial, and that he ought to have called upon the accused to discharge the onus which lay upon him of proving that he was not a person required to register. I therefore order that the case be remitted to the learned Magistrate with directions to him to re-open it and to call upon the accused for his defence.

Order accordingly.

MALAYA BORNEO BUILDING SOCIETY LTD. v. M. RAMACHANDRAN

[C.A. (Thomson C.J., Smith and Ong JJ.) January 21, 1959]

[K.L. — F.M. Civil Appeal No. 42 of 1958]

Contract — Building contract — Building society holding State land as approved applicants entering into agreement with customer and expending money to build house — Customer defaulting — Relief.

The appellant building society are approved applicants of State land at Petaling Jaya and the respondent was one of their customers who, pursuant to an agreement made between them had been put in possession of a plot of the land, upon which the appellants had expended moneys to build a dwelling house. The respondent having defaulted in performing his part of the agreement by refusing either to make the stipulated monthly payments or to deliver up possession of the property to the appellants, they terminated his licence and brought this action asking for the remedies to which a foreclosing mortgagee would be entitled, asked for judgment for the whole of the capital sum payable under the agreement, for an order for possession and for an order of sale, the proceeds of sale to be applied in reduction of the capital sum due.

Held: the appellants are entitled to compensation for damage they have suffered. The measure of damages must be the actual loss. In the circumstances of the case damages at the rate of $50 per month from the date of respondent's occupation until possession is given is reasonable.

Cases referred to:—

(1) *The State of Johore v. Tan Ah Boon* [1934] M.L.J. 142.

(2) *Doe v. Baytup* 3 A. & E. 188, 192.

(3) *The Kestrel* 1 A. & E. 78.

(4) *Ministry of Agriculture v. Mathews* [1949] 2 All E.R. 724.

(5) *Haji Abdul Rahman v. Mohamed Hassan* (1915) 1 F.M.S.L.R. 290, P.C.

COURT OF APPEAL.

J. S. H. Skrine for the appellant.

R. R. Chelliah, amicus curiae.

Cur. Adv. Vult.

Thomson, C.J.: This appeal arises from an action brought by the Malaya Borneo Building Society, Ltd. (which I shall call the Society) against a Mr. Ramachandran arising from an agreement between the parties dated 8th November, 1956, relating to the occupation of a plot of land by Mr. Ramachandran in the Township of Petaling Jaya.

Apart from originally entering appearance Mr. Ramachandran has taken no part in the proceedings. As, however, the case was clearly one of difficulty and as we were informed that the questions which it raised were of some public importance we invited Mr. R. R. Chelliah to assist us as *amicus curiae* and before proceeding further I would wish to express our appreciation of the assistance we have derived from the learned and penetrating argument which Mr. Chelliah addressed to us.

Some time ago the Government decided to set up a new town on State Land at Petaling Jaya in the State of Selangor. The simplest way of doing this would have been to alienate plots of land within the area in question to persons who wished to reside or carry on business there. Such a course was, however, not considered desirable and other arrangements were made with the Local Authority which had been set up for the new town and the Building Society which is what is loosely known as a Government-sponsored organisation and is financed by the Colonial Development Fund and which is registered as a limited liability company in Singapore.

In very bare outline the nature of these arrangements was as follows. The Administrator of the new town was appointed a Collector of Land Revenue. Any prospective inhabitant approached the Building Society who thereupon applied to the Collector to be allowed to go into occupation of a plot of land in expectation of registration of title under section 17 of the Land Code. On the application being approved the Society paid the necessary premium and fees and were placed on the "Roll of Approved Applicants" under rule 7 of the Land Rules and entered into occupation. They then paid for the erection

of premises as required by the prospective inhabitant and in due course allowed him into occupation of the premises.

Now, all this involved the expenditure of a considerable sum of money by the Society and where the prospective inhabitant wished to pay this by instalments over a considerable period it will be clear to anyone with knowledge of the local land laws that it was a matter of very great difficulty to devise a form of agreement covering the transaction which on the one hand the prospective inhabitant would be prepared to accept and which on the other hand would give the Society adequate security for the money it had spent. This was sought to be done by treating the money spent by the Society as a loan and by the use of a form of agreement which, if I may use the expression without offence, can best be described as a parody of an English building society mortgage. Whether this form of agreement altogether attains the ends it has in view is a matter which cannot be finally settled in the present proceedings but it certainly says much for the ingenuity of the Society's legal advisers.

It was an agreement in this form that was executed by Mr. Ramachandran on 8th November, 1956. It recited that the Society was entered on the Roll of Approved Applications for the State of Selangor as approved applicant for the plot of land in question and that the Society had agreed to sell and Mr. Ramachandran had agreed to purchase "the said lot and the buildings thereon" at a price of $5,000 of which $500 had been paid. It was then agreed (Clause 1) that the Society should sell and Mr. Ramachandran should purchase "all the Society's rights title and interest *in* the said lot" for $5,000. Mr. Ramachandran became entitled to "enter into possession" of the land (Clause 2) and undertook to pay the balance of the purchase price with interest by monthly instalments of $40 (Clauses 3 and 4) which later became a little more by reason of certain provisions as to the rate of interest. There then followed a number of provisions as to calculation and payment of interest, insurance and user of the premises and other matters (Clauses 5 – 13) which do not call for discussion here. I shall return to Clauses 14 and 15 shortly but the subsequent Clauses provided that when the Society became registered proprietors of the plot they should transfer their interest as such to Mr. Ramachandran in accordance with the provisions of the Land Code subject to his giving them a registrable charge under the Code to secure any outstanding payments due under the agreement.

I now return to Clauses 14 and 15 which are the clauses by which the Society sought to take its security and are the clauses particularly in issue in the present litigation.

Clause 14 provided that if Mr. Ramachandran made default in payment of any monthly payment under Clause 4 or if certain other events occurred the Society should have the right to demand immediate payment of the entire balance of the debt which should then become immediately payable and in the event of any part of it remaining unpaid after fourteen days from the date of demand then:

> "The Society shall have the right and power to enter upon the said lot and to deal with all the interest of the Society in the said lot and the buildings thereon arising out of the entering of the name of the Society upon the said Roll of Approved Applications as aforesaid or the registration of the Society as owner of the said lot or otherwise in all respects as if the Society were absolutely and beneficially entitled thereto including the right and power to sell and transfer the said interest at such price and in such manner and subject to such conditions as the Society shall in its absolute discretion think fit free from any interest of the purchaser hereunder or otherwise and the Society shall apply the net proceeds of any such sale after payment of the costs and expenses thereof and incidental thereto in or towards the payment of the balance of the debt payable and the Society shall pay to the purchaser any balance then remaining of such proceeds and no purchaser from the Society shall be concerned to see whether any such default has in fact been made by the purchaser or any other occasion has arisen for the exercise of the Society's power of sale hereunder."

By Clause 15 Mr. Ramachandran covenanted that he would during the continuance of the agreement "retain possession of the said lot as the licensee of the Society and by no other right" and that as soon as the power of sale under Clause 14 should arise he would "on demand give vacant possession of the said lot to the Society."

Before proceeding further with the examination of this agreement it will be well to be clear as to the true position of the land mentioned in it and as to the rights of the Society in relation to that land. With all respect to the argument on the point which has been addressed to us by Mr. Skrine it is not necessary to consider the question as to whether in the State of Selangor apart from certain short lease holders anyone except the Ruler of the State can have any interest in land which does not appear on the face of the land register. If that question did arise I should on my present understanding of the land law answer it with a definite negative.

But the question does not arise for the Society are in occupation of the land here under approved application in expectation of registration of title under section 17 of the Land Code and have no rights in relation to the land except such as flow from such occupation. By section 2 of the Code land held under approved application "shall be taken and deemed to be State Land"; and by section 8 "the entire property in.....State land is and shall be vested solely in the Ruler." Because of these provisions, which differ materially from the corresponding provisions in the Johore Land Enactment with which the Court was concerned in the case of *The State of Johore v. Tan Ah Boon*, [1] there can be no question of any property in land occupied under approved application being vested in the occupant and to ascertain what rights the occupant has in relation to such land it is necessary to look to section 18 of the Code and Rules 7 to 15 of the Land Rules. Briefly, these rights are that he is entitled to occupy the land, that he has certain contingent rights to registration of title, and that in certain conditions he may subject to the consent of the Collector assign his rights as approved applicant *tanta et talia*. He cannot, however, assign more than he himself has, *non dat qui non habet* and rule 10 of the Rules makes it clear that no dealing in his rights can in any circumstances be capable of registration.

Returning now to the agreement, Mr. Ramachandran agreed to pay $5,000. He paid $500 down and he agreed to pay the balance of the $5,000 by monthly instalments and to pay interest on so much of the original sum as was from time to time outstanding.

In return for his payment and his promise of future payments he got three things.

In the first place he was allowed to occupy the land and exercise such possessory rights in relation to it as were vested in the Society. What he got in effect was the right to occupy the land as licensee of the Society and that licence was to endure until one of two things happened. First, it might be replaced by an assignment of the Society's rights as approved applicants or by an out and out transfer of the land. Secondly, by Clause 14 in the event of any breach of the conditions of the agreement and in particular in the event of his defaulting in making any of the stipulated monthly payments the Society were at liberty to demand the whole of the money outstanding under the agreement and in the event of this not being paid within 14 days the Society were at liberty to enter on the land and deal with it. By Clause 15 it was agreed that should the Society thus acquire the power to enter on the land Mr. Ramachandran would give immediate vacant possession and it is significant that in the same Clause Mr. Ramachandran agrees that he will during the continuance of the agreement retain possession of the land "as the licensee of the Society and by no other right."

In the second place Mr. Ramachandran got a promise that unless he earlier got a transfer of the land the Society would do all it could to transfer to him its rights as approved applicants when he had paid all he promised to pay the Society.

And in the third place he got a promise that if and when the Society became registered proprietors of the land it would transfer it to him subject to his giving a registrable charge over it by way of security for any payments outstanding under the agreement.

The agreement was thus partly executed and partly to be executed in the future. Mr. Ramachandran paid his $500 and agreed to make further payments. The Society gave him a licence to occupy the land and promised to do their best to give him other things in the future.

Such, in my view, was the true nature of the agreement between the parties.

But it is not the view that has been taken by the Society. Their view of the transaction, as I understand it, has been in effect that they sold some interest in the land to Mr. Ramachandran for $5,000, that he paid $500 down and that notionally they lent him $4,500 to pay the balance of the purchase price and that he mortgaged the interest in the land which he acquired to them as security for the loan. In the light of the facts that all he got was a bare licence to occupy the land, that he did not even get the Society's rights as approved applicants, and indeed could not get these rights till the whole of the purchase money was paid, and that he could not get a registrable title to the land before the full purchase money was paid unless he executed a legal charge it is difficult to regard this view of the Society as anything but a bundle of legal fictions.

Be that as it may, however, such was the view that the Society took and what they acted on in the present proceedings. Mr. Ramachandran failed to pay his instalments for the months of May, June and July, 1957, and failed to comply with a demand from the Society's

solicitors for payment of the whole sum payable under the agreement and with a further demand for possession. On that the Society commenced proceedings asking for the remedies to which a foreclosing mortgagee would be entitled. Apart from certain ancillary remedies they asked for judgment for the whole of the capital sum payable under the agreement, for an order for possession and for an order of sale, the proceeds of sale to be applied in reduction of the capital sum due.

In the event the learned trial Judge refused to make an order for possession on the ground that he was concerned with an action for the possession of land, that in such an action the plaintiff must set up a good title, that the Society were only in occupation of the land as licensees and that as such they did not possess a sufficient title to succeed. He was, however, of the opinion, for which he did not state any grounds, that the Society were entitled to recover the whole of the moneys payable under the agreement less the proceeds of sale of its rights in relation to the land and he entered judgment accordingly.

With great respect I am unable to agree with these conclusions of the learned Judge.

The Society were in lawful occupation of the land. It is true that they could not assign their rights of occupation without the consent of the Collector (see Land Rules No. 10) although it is equally clear that there was no question of their attempting to do so until all the money payable under the agreement was paid in full (see Clause 17 of the agreement). Moreover, by reason of section 18 of the Code and rule 10 of the Rules no dealing with the Society's rights even with the consent of the Collector could be capable of registration. But short of assignment of its rights there is nothing in the Code, in the Rules or in the document placing the Society on the Roll of Approved Applications which prevents the Society giving a licence to anybody to go on to the land and to occupy it and do anything on it that the Society itself could do on it. And if the Society does grant such a licence and that licence comes to an end for any reason and the licensee remains on the land after he has ceased to have any contractual right to remain on it it is impossible to see any reason why they should not be entitled to have an order for possession against him. It is true that the property in the land is vested not in the Society but in the Ruler. They are, however, entitled to possession by reason of the Ruler's licence and can assert this right to possession against anyone who cannot show a better right or title. It may be that in certain circumstances a party in actual possession might be able to pray in aid against them the doctrine of *beati possidentes*. But the present respondent cannot do so for he originally came into possession as their licensee and against him they have a title by estoppel just as they would have had if he had been their tenant. In this connection, as Coleridge, J., said in the case of *Doe v. Baytup*, [2] "there is no distinction between the case of a tenant and that of a common licensee." In the circumstances, then, I would give the Society an order for possession as prayed.

There then arises the question of what further remedy, if any, the Society should have. To my mind the true position is that Mr. Ramachandran was in breach of the agreement and the Society, quite properly, elected to treat it as at an end. That being so what they are entitled to is compensation for damage they have suffered. In view of the largely executory nature of the agreement they are clearly not entitled to recover the whole of the purchase price for something they have not given nor have so far been in a position to give. And to give them the whole amount by way of damages would be in effect to impose a penalty. The measure of damages must be the actual loss. This, however, is by no means easy to assess. They have paid over $500 to the State so far for the use of the land. In addition they have spent money, though there is no evidence as to how much, on building a house on the land. Since Mr. Ramachandran defaulted in his monthly payments they have been lying out of their money without any return. Moreover, they have been prevented from making a new bargain with another party. They themselves have laid their damages at $50 a month and in all the circumstances of the case this would appear to be reasonable. I would, therefore, give them damages at the rate of $50 a month from the date when the respondent entered into occupation of the land until the date when he ceases to occupy it less all sums already paid by him including the original payment of $500, these damages to carry interest at the rate of 6% per annum calculated from the date of judgment.

There is one further matter and that is the matter of costs. By Clause 5(vi) of the agreement Mr. Ramachandran agreed to repay to the Society any payments made by them in respect of "the preservation protection and reasonable

improvement generally of the security of the Society." On the strength of this it was argued that the Society in the present proceedings were entitled to their costs as between solicitor and client. With this the learned trial Judge did not agree. Nor do I. And I find support for my view in the case of *"The Kestrel."* [3]

In my view, then, the appeal should be allowed, the judgment in the Court below should be set aside and judgment should be entered for the appellant in accordance with what has been said. The appellant should have its costs here and in the Court below to be taxed as between party and party.

Smith J.: I agree with the judgment of the learned Chief Justice.

In my opinion, what the Society set out to do was to transfer to the defendant "all the Society's rights, title and interest in the lot and the buildings erected thereon." This was only to be done when the full purchase price had been paid and until such time as that price was paid the defendant was entitled to occupy the lot as licensee of the Society provided the defendant observed certain conditions the principal of which was the payment of instalments of purchase price.

It is quite clear from the definition of "State land" in section 2 of the Land Code of Selangor that land held under an approved application is State land and it is clear by section 18 of the Code that the approved applicant has no right to registration of title. All that the approved applicant has is "rights by way of expectation of title to the land" as stated by rule 12 of the Land Rules, 1930. These rights are capable of assignment provided that rule 12 is complied with. Rule 12 requires that prior permission be obtained by the approved applicant to assign his rights by way of expectation of title to a third party and that the application for permission shall be made in the form given in Schedule V to the Rules. The Collector has the power to refuse such transfer and there is provision for an appeal to the Ruler.

Although the Collector and the State Government were fully aware of what was taking place at Petaling Jaya the fact remains that rule 12 of the Land Rules has never been complied with and that the defendant has not been formally approved by the Collector as assignee of the Society's rights in the lot. There has, therefore, been no assignment of rights by way of expectation of title by the Society to the defendant who has no interest under the Land Code in the lot.

What is the interest of the defendant in respect of the lot? He clearly entered on the lot with the consent of the Society. It is quite clear that the defendant went into occupation of the lot as the licensee of the Society: in Clause 15 of the Agreement the purchaser covenanted that he would during the continuance of the Agreement retain possession of the said lot as the licensee of the Society. It is not disputed that the defendant was in default with regard to his part of the Agreement by defaulting in his monthly payments. The Society was perfectly at liberty to terminate the licence which it had given to him.

It appears to me that we are confronted here with a contract of which only certain parts are at present capable of enforcement. Those parts of the Agreement which refer to a future assignment to the defendant of the rights in expectation of title of the Society do not fall to be considered now because the full purchase price has not yet been paid by the defendant. The covenant by the defendant with the Society that he should retain possession as licensee of the Society and his covenant to pay the instalments of purchase price regularly are capable of enforcement. I therefore agree that the Society is entitled to be put into possession again of the lot since the defendant is in default and his licence has been terminated.

As to damages to be awarded to the Society I agree that a sum of $50 per mensem from the defendant's occupation until possession is given is reasonable and that credit be given for moneys paid by the defendant.

The Society prayed a number of orders. The first was that the defendant do pay to the Society the balance of the money due under the Agreement between them. I do not see that the Society is entitled to this since the Society was not in a position to complete the transaction either by assigning its rights as approved applicant or as registered owner.

The prayer that the defendant do pay to the Society the costs of this suit as taxed between solicitor and client has been dealt with in the judgment of the learned Chief Justice and with him I respectfully agree.

The prayer that the defendant do forthwith quit and deliver up to the Society vacant possession has been granted.

The Society sought a declaration of its right "to deal with the interest of the plaintiff in the

said lot." Since the sole interest which the defendant had in the lot was as licensee of the Society and the Society has lawfully terminated his licence, it follows that the defendant has no longer any interest of any kind in the lot and that therefore this declaration must be refused.

I therefore agree with the judgment of the learned Chief Justice and would allow the appeal in the terms which he has suggested.

Ong J.: The question for decision in this appeal is what reliefs, if any, ought to be granted to the appellants against the respondent who, pursuant to an agreement made between them on 8th November, 1956, had been put in possession of a plot of State land of which the appellants were the approved applicants, and upon which the appellants had expended moneys to build a dwelling house. The appellants are a Building Society and the respondent was one of their customers who had defaulted in performing his part of the agreement by refusing either to make the stipulated monthly payments to the appellants or to deliver up possession of the property to them.

In an ordinary transaction between a Building Society and their customer the land which is the subject-matter of the transaction is available to the Society as security for the moneys they advance. In the present case, however, the transaction could not be carried out in this manner. Here all that the appellants had was an approved application, their name was entered in the "Roll of Approved Applicants," and they were given only occupation of the land in expectation of registration of title. Under rule 10 of the Land Rules: "No dealings in the land comprised in an approved application shall be capable of registration by the Collector, nor shall any claim under section 107 to be recorded as the occupant of the land comprised in an approved application be entertained." The appellants therefore had only one recourse open to them whereby to protect their investments, and that is by contract.

Accordingly, when the appellants received an initial part payment of $500 from the respondent and put him in possession of their land, they had to rely on their rights arising entirely *ex contractu*. By Clause 1 the parties purportedly agreed that "the Society shall sell and the purchaser shall purchase all the Society's rights, title and interest" in the said land at the price of $5,000, and Clause 3 contained a covenant for payment of the balance of purchase price which was called "the loan," together with interest and other moneys which were referred to as "the Debt Payable." Clauses 4 to 9 provided for payment by instalments, rate of interest, insurance on the property, etc. Clause 14 stipulated that in case of default by the purchaser in making the monthly payments (and in certain other contingencies with which we are not concerned) —

> "The Society shall be at liberty to demand immediate payment of the balance of the debt payable and upon such demand being made as aforesaid all moneys secured hereby shall become immediately payable and in the event of any part of such moneys remaining unpaid after fourteen days from the date of such demand the Society shall have the right and power to enter upon the said lot and to deal with all the interest of the Society in the said lot and the buildings thereon arising out of the entering of the name of the Society upon the said Roll of Approved Applications as aforesaid or the registration of the Society as owner of the said lot or otherwise in all respects as if the Society were absolutely and beneficially entitled thereto including the right and power to sell and transfer the said interest at such price and in such manner and subject to such conditions as the Society shall in its absolute discretion think fit free from any interest of the purchaser hereunder or otherwise and the Society shall apply the net proceeds of any such sale after payment of the costs and expenses thereof and incidental thereto in or towards the payment of the balance of the debt payable and the Society shall pay to the purchaser any balance then remaining of such proceeds and no purchaser from the Society shall be concerned to see whether any such default has in fact been made by the purchaser or any other occasion has arisen for the exercise of the Society's power of sale hereunder."

The agreement further expressly provided in Clause 15 that the purchaser would hold the land as licensee of the Society and by no other right, and that he would give up immediate possession thereof to the Society as soon as their power of sale should arise.

From and after May 1957 the respondent defaulted in paying the monthly instalments and on 11th September, 1957 the appellants demanded payment of the balance due from him under the agreement, amounting (with accrued interest) to $4,670.76, and this sum not having been paid, the appellants on 7th November, 1957 gave further notice requiring him to deliver up vacant possession of the property. On 3rd January, 1958 the appellants filed action. The respondent duly entered appearance, but did not file a defence within the time limited, or subsequently, and on 7th June, 1958 the appellants took out a notice of motion for judgment. The learned Trial Judge gave judgment on 25th August, 1958 whereby the respondent was ordered to pay to the appellants the sum of $4,670.76 as claimed, with interest and costs as between solicitor and

client to be taxed. The claim to possession was refused. Against this order the appellants have appealed, claiming to be entitled also to further orders substantially on the basis of prayers 3, 5 and 6, that is, to possession and to declarations regarding their powers of sale and application of the proceeds of sale.

It is clear that the appellants' primary object in taking action was to recover possession and damages from the respondent. On this point I am unable, with all respect to the learned Trial Judge, to agree with him that because the appellants were unable to set up a good title in themselves, they were therefore disentitled to recover possession of the land from the respondent. If the respondent was in possession as a licensee under the appellants — and Clause 14 did so expressly stipulate — then under section 116 of the Evidence Ordinance —

"No person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given."

Here the respondent, not having filed any defence, must be taken to have admitted all allegations of fact made in the Statement of Claim. The licence granted to the respondent having been revoked, he had become a trespasser, and no question of the appellants having to prove their title therefore arose. In any event, a person only entitled to possession of land who had put a licensee in occupation thereof is clearly entitled, after due revocation of the licence, to recover possession from him who has become a trespasser: *Ministry of Agriculture v. Mathews.* (4)

It seems to me that to disentitle the appellants from obtaining any of the reliefs prayed for, the contract under which they claim must be tainted by illegality. Here the respondent, by his failure to file any defence, did not dispute the legality of the contract, neither was there any illegality on the face of the record. On this point Mr. Chelliah who was invited to assist this Court as *amicus curiae* argued strongly that the contract was illegal and void *ab initio* on the grounds that the appellants had therein purported to sell all their rights, title and interest in the land without the permission of the Collector, and such dealings with the land being inconsistent with the provisions of the Land Code and Land Rules are void by reason of section 24 of the Contracts Ordinance. With the greatest respect to Mr. Chelliah, who I think argued the case with conspicuous force and ability, I have come to a different conclusion.

The parties making the contract knew well that they were contracting in respect of land held under approved application only, and it must be assumed that the respondent, no less than the appellants, intended to be bound by its terms, and that the parties intended to carry out the contract legally rather than in some other manner which is contrary to law. It is implicit in rule 10 of the Land Rules that freedom of contract is not struck at, but that only no dealings in land comprised in an approved application shall be capable of registration. The appellants could only deal with such rights as they had: *nemo dat quod non habet.* As they possessed no real right to the land but only rights resting on contract, they were not in truth and in fact dealing with any interests in land. What their Lordships of the Privy Council held in the case of *Haji Abdul Rahman v. Mohamed Hassan* (5) with reference to section 4 of the (Selangor) Registration of Titles Regulation, 1891, is, I think, equally applicable to the present case. Lord Dunedin there said:

"The agreement under discussion.....could not be and was not registered. It is therefore clear that it conferred no real right in the land, which remained after the transfer duly registered as the unburdened property of the defendant. But when that is said section 4 has no further application. It does not profess to prohibit and strike at contracts in reference to land, provided that such contracts cannot be construed as attempting to transfer, transmit, mortgage, charge or otherwise deal with the land itself. In other words, it is contracts or conveyances which, but for the section, might be held to create real rights in a party to the contract or conveyance which alone are struck at."

I am therefore of opinion that the contract in question is not contrary to the letter or the spirit of the Land Code or Rules.

Neither, for that matter, am I persuaded that the contract is void under section 24 of the Contracts Ordinance by reason of its object being of such a nature that, if permitted, it would defeat the provisions of any law. If the contract in this case were in respect of land held under Temporary Occupation Licence I should not hesitate to say that it was void by reason of section 24 because the benefits of the licence were to pass to be enjoyed by a person who was not the licensee. Rule 41 of the Land Rules states in terms that "no licence for the temporary occupation of State land shall be transferable," which is clearly distinguishable from the limitation imposed by rule 10 on transactions relating to land comprised in an approved application, namely, that such dealings shall only be incapable of registration.

In the result I am of opinion that the contract is valid and the appellants entitled to repossession. That is sufficient for their purposes. I do not see how they can be entitled, as approved applicants, to the declarations in prayers 5 and 6. As a further consequence, the order of the learned Judge for the payment of the sum of $4,670.76 and interest cannot stand, because any such claim was really for damages, and in lieu thereof I think an appropriate order would be for damages at the rate of $50 per month from the date of respondent's entry into occupation until possession delivered to the appellants, with interest thereon from date of judgment at the rate of 6 per cent per annum. The respondent should be entitled to deduct from the total of such damages the first payment of $500 which he had made, and the monthly payments which had been credited to his account.

As to costs, I am unable to see any reason for the same to be taxed as between solicitor and client. On the other hand I think the appellants were justified to file this action in the High Court, and they should have their costs here and in the Court below to be taxed as between party and party.

Since the above judgment was written I have had the advantage of reading the judgment of the learned Chief Justice and I would respectfully express my complete agreement therewith.

Appeal allowed.

Solicitors: *Bannon & Bailey; R. R. Chelliah.*

CHEONG SIK KWAN v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Smith and Ong JJ.) January 26, 1959]

[K.L. — F.M. Criminal Appeal No. 32 of 1958]

Criminal Law and Procedure — Criminal breach of trust by servant — Falsification of accounts — Series of operation — Whether single transaction — Joinder of charges — Illegality.

Penal Code, ss.408 and 477A — Series of operation — Whether single transaction.

Criminal Procedure Code (Cap.6), ss.153 (ii), 163, 164, 165 and 170.

Where charges are tried together in contravention of any provisions of the Criminal Procedure Code there is an illegality which cannot be cured, and any conviction had cannot be sustained. *Subramania Ayyar v. King-Emperor.* (1)

In this case the appellant was convicted for four offences of criminal breach of trust in contravention of section 408 and three offences of falsification of accounts in contravention of section 477A of the Penal Code.* The only ground of appeal was that the charges against the appellant were joined and tried together in contravention of the provisions of the Criminal Procedure Code and therefore by reason of the effect attributed to these provisions in the case of *Subramania Ayyar v. King-Emperor* (1) the convictions should be set aside.

Held: the whole series of operations on which the charges were based was in fact a single transaction. On the facts proved there was a settled purpose to cheat. In the circumstances of the case the appeal must be dismissed.

Cases referred to:—

(1) *Subramania Ayyar v. King-Emperor* 28 I.A. 257, P.C.

(2) *Babulal Choukhani v. Emperor* A.I.R. 1938 P.C. 130; 65 I.A. 158; 174 I.C. 1, P.C.

(3) *Lim Yean Leong v. Public Prosecutor* [1940] M.L.J. 272.

(4) *Emperor v. Datto Hanmant Shahapurkar* I.L.R. 30 Bom. 49.

(5) *Chin Choy v. Public Prosecutor* [1955] M.L.J. 236.

(6) *Bracegirdle v. Oxley* [1947] 1 K.B. 349, 358.

COURT OF APPEAL.

N. A. Marjoribanks for the appellant.

Harun bin Haji Idris (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Thomson C.J. delivering the judgment of the Court: This appellant was convicted in the High Court at Ipoh on 28th October, 1958, for four offences of criminal breach of trust in contravention of section 408 of the Penal Code and three offences of falsification of accounts in contravention of section 477A. He was sentenced to terms of imprisonment amounting in all to four years. He has now appealed against his convictions and his sentences.

The only ground of appeal that has been argued before us is that the charges against the appellant were joined and tried together in contravention of the relevant provisions of the Criminal Procedure Code and that therefore by reason of the effect attributed to these provisions in the well known case of *Subramania Ayyar v. King-Emperor* (1) the convictions should be set aside.

On the view we have formed as to the question actually involved in the appeal and before considering the actual charges on which

* The charges appear at pp. 190, 191 of the report.